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No. 85350-9

SUPREME COURT OF THE STATE OF WASHINGTON
(Court of Appeals No. 38411-6-II)

VISION ONE, LLC and VISION TACOMA, INC.,

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondent.

PHILADELPHIA INDEMNITY'S
RESPONSE TO AMICUS PETITION OF
BUILDING OWNERS AND MANAGERS
ASSOCIATION AND NAIOP –
WASHINGTON STATE CHAPTER

Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Mountain Monroe, WSBA #35843
KARR TUTTLE CAMPBELL
1201 Third Ave., Ste. 2900
Seattle, Washington 98101
Telephone: 206.223.1313
Facsimile: 206.682.7100

Attorneys for Respondent Philadelphia
Indemnity Insurance Company

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I. Introduction

Building Owners and Managers Association and NAIOP (collectively "BOMA/NAIOP") argue that the *Vision One*¹ court's interpretation of "resulting loss" coverage and the "directly and solely" language is of widespread importance to building owners, contractors and "to the proper and intended purpose of property insurance in general." (Br. Pg. 2) However, BOMA/NAIOP makes no compelling argument that the *Vision One* court misinterpreted the policy or departed from Washington law in any respect.

II. The *Vision One* court's analysis of resulting loss coverage is consistent with Washington law and the language of the Philadelphia policy.

BOMA/NAIOP argue that the Philadelphia policy provides for resulting loss coverage through a number of provisions and not just as an exception carved out of the faulty workmanship exclusion. This may be true but it is unhelpful. Even if other exclusions have their own forms of resulting loss coverage, all that is at issue is resulting loss in the context of the policy's faulty workmanship exclusion.

¹ *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 158 Wn. App 91, 241 P.3d 429 (2010) ("*Vision One*").

BOMA/NAIOP accuses the *Vision One* court of “unilateral importation” of the terms “indirect” and “independent” into the insurance contract in violation of long-standing rules of policy construction. (Br. Pgs. 4-7) This argument mischaracterizes the *Vision One* court’s reasoning. The *Vision One* court used these terms to explain the trigger and the scope of the resulting loss exception to the faulty workmanship exclusion. Nothing in *Vision One* supports the assertion that the court “imposed” new conditions of coverage found in the policy itself. A court does not re-write an insurance policy by explaining important concepts in language other than the words of the policy itself.

Like *Vision* and other amicus parties, BOMA/NAIOP contend that *Vision One* conflicts with *Sprague v. Safeco Insurance*, 158 Wn. App 336, 241 P.3d 1276 (2010). BOMA/NAIOP raise no new arguments but they do mistakenly say “the key language of the policy at issue in *Sprague* is not substantively different than the language of the Philadelphia policy in *Vision One*.” (Br., pg. 6) This is categorically untrue. The language in Philadelphia’s commercial policy is completely different than the ensuing loss language in the *Sprague* homeowners policy. (Answer to Pet., pgs. 4-5)

Apart from literal and structural differences between the policies, there are at least two explanations for the different outcomes reached in *Sprague* and *Vision One*:

First, the ensuing loss language from *Sprague* functions like the type of provision distinguished by the *Vision One* court (Answer to Pet., pgs. 4-5); and

Second, *Sprague* is factually unique in that the insurer's own senior representative essentially acknowledged coverage. (Answer to Pet., pgs. 3-4)

Finally, BOMA/NAIOP largely ignore a fundamental and threshold error of the trial court just as *Vision* did in its Petition for Review. (Answer to Pet., pgs. 9-10) As the *Vision One* court noted, by characterizing the slab collapse as a resulting loss the trial court effectively, and improperly, removed loss causation from the jury's consideration (because resulting loss arises only through the faulty workmanship exclusion not the defective design exclusion.) 158 Wn. App. at 105-06. If a properly instructed jury found the loss was caused by defective design, the faulty workmanship exclusion and its resulting loss exception would not apply. The trial court's failure to allow the

jury to perform its proper role warrants remand regardless of any resulting loss issues.

III. The *Vision One* court correctly applied Washington's efficient proximate cause rule.

BOMA/NAIOP repeat Vision's argument that the "directly and solely" language should trump the efficient proximate cause rule. (Br. Pgs. 8-9) Philadelphia has explained elsewhere that this is a contrived argument that hinges on an unreasonable interpretation of the policy language. In effect, BOMA/NAIOP urge this Court to read the policy to provide coverage anytime a loss is caused by two or more perils even if the perils are excluded. BOMA/NAIOP appear to argue that if a loss cannot be attributed "directly and solely" to any one excluded cause then none of the exclusions apply. This makes no sense. Exclusions diminish coverage. They are not intended to neutralize one another in circumstances where more than one apply. Nothing in the policy or Washington law allows the efficient proximate cause rule to be supplanted by a tortured policy interpretation that invites gamesmanship in crafting theories of loss. As the *Vision Court* observed, "whenever the term 'cause' appears in an exclusionary clause, it must be read as "efficient proximate cause." *Vision One*, 158 Wn App at 105 citing *Safeco Ins. Co. of Am v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d

413. The *Vision One* court properly applied the principle and the efficient proximate cause rule in reaching its decision.

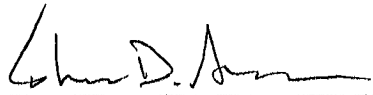
IV. Conclusion

The *Vision One* court correctly applied Washington law in evaluating the trial court's handling of loss causation and interpretation of key policy provisions. The *Vision One* court's analysis is unaffected by *Sprague* and fully consistent with prior decisions of this Court. Philadelphia respectfully requests this Court deny the Petition for Review.

DATED this 9th day of February, 2011.

Respectfully submitted,

KARR TUTTLE CAMPBELL

By: 
Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Monroe, WSBA #35843
Attorneys for Philadelphia Indemnity
Insurance Company

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<p>Jerry Edmonds Teena Killian Williams, Kastner & Gibbs PLLC Two Union Square 601 Union Street, Ste. 4100 Seattle, WA 98101 Tel: 206.628.6600 Fax: 206.628.6611 jedmonds@williamskastner.com tkillian@williamskastner.com <i>Counsel for D&D, Vision One, and Vision Tacoma</i></p>	<p>Daniel F. Mullin Tracy A. Duany Mullin Law Group PLLC 101 Yesler Way, Ste. 400 Seattle, WA 98104 Phone: 206.957.7007 dmullin@mullinlawgroup.com tduany@mullinlawgroup.com <i>Counsel for Berg Equipment & Scaffolding, Inc.</i></p>
<p>Dennis J. Perkins Attorney at Law 1570 Skyline Twr. 10900 NE 4th St. Bellevue, WA 98004 Phone: 425.455.5882 dperklaw@seanet.com <i>Counsel for Berg Equipment & Scaffolding Co., Inc.</i></p>	<p>Michael D. Helgren Barbara H. Schuknecht David A. Linehan McNaul Ebel Nawrot & Helgren 600 University St., Ste. 2700 Seattle, WA 98101-3143 Phone: 206.467.1816 MHelgren@mcnaul.com BSchuknecht@mcnaul.com DLinehan@mcnaul.com <i>Counsel for RSUI Indemnity Company</i></p>
<p>Charles K. Wiggins Wiggins & Masters PLLC 241 Madison Ave. N. Bainbridge Island, WA 98110 Phone: 206.780.5033 Charlie@appeal-law.com <i>Counsel for RSUI Indemnity Company</i></p>	

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Via Facsimile and U.S. Mail to:

<p>John P. Ahlers Ahlers & Cressman PLLC 999 Third Ave., Ste. 3800 Seattle, WA 98104-4023 206-287-9902 <i>Counsel for Construction Contractor Industry Amicae</i></p>	<p>Joseph E. Lynam Abraham K. Lorber Lane Powell PC 1420 Fifth Ave., Ste. 4100 Seattle, WA 98101-2338 206-223-7107 <i>Counsel for Amici Curiae Building Owners and Managers Association Seattle/King County, Building Owners and Managers Association South Puget Sound, Building Owners and Managers Association Tri-Cities, Building Owners and Managers Association Spokane, and NAIOP - Washington State Chapter</i></p>
<p>John S. Riper Ashbaugh Beal LLP 701 Fifth Ave., Ste. 4400 Seattle, WA 98104-7012 206-344-7400 <i>Counsel for Construction Contractor Industry Amicae</i></p>	


Heather L. White

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Vision One and Vision Tacoma, Inc. v. Philadelphia Indemnity Insurance Company
No. 85350-9


Filed on behalf of:
Thomas D. Adams, WSBA #18470
Karr Tuttle Campbell
1201 Third Ave., Ste. 2900
Seattle, WA 98101
206-223-1313

KARR ▾ TUTTLE ▾ CAMPBELL

Heather White

Legal Secretary
1201 3rd Avenue, Suite 2900
Seattle, Washington 98101
• direct 206-224-8190
• main 206-223-1313
• fax 206-682-7100
Visit our website www.karrtuttle.com

A Law Firm for the Pacific Northwest

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